PD-0251-23
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/17/2023 6:57 AM
Accepted 7/17/2023 8:54 AM
DEANA WILLIAMSON
CLERK

PD-NO-0251-23

IN THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
7/17/2023
DEANA WILLIAMSON, CLERK

Mark Bethel, Appellant

v.

The State of Texas, Appellee

ON APPEAL FROM THE 140TH DISTRICT COURT

OF LUBBOCK COUNTY, TEXAS

AND ON DISCRETIONARY REVIEW

FROM THE SEVENTH JUDICIAL DISTRICT AT AMARILLO

In the Court of Appeals of Texas

Seventh District of Texas

Amarillo, Texas

Bethel v. State, _____ S. W. 3d _____ No. 07-21-00297-CR, 2023 WL 2402355, (Tex. App. – Amarillo Mar. 8, 2023, no pet. h.) (designated for publication)

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Respectfully submitted,

By: /s/ John E. Wright

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ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.1(a), all interested parties are set out below so the members of this Honorable Court may determine whether they are disqualified or subject to recusal in the decision of this case.

PARTIES	COUNSEL
MARK BETHEL Appellant	**Appellant's Trial Attorneys** Russell I. Gunter Attorney at Law 1213 Avenue K Lubbock, Texas 79401 806-771-3933 Christopher Wanner Attorney at Law 1402 Texas Avenue Lubbock, Texas 79401 ***Appellate Counsel*** John Wright Attorney at Law P. O. Box 6547 Huntsville, Tx 77342-6547 Telephone: (936) 291-2211 Email: wright49@swbell.net SBN: 22048500

The State of Texas Appellee	*Trial Counsel* Amanda Say/Barron Slack Lauren Murphree Assistant Criminal District Attorneys Lubbock County Criminal District Attorney's Office P. O. Box 10536 Lubbock, Texas 79408 806-775-1100 Fax: 806-775-7930 ***On Appeal:*** Lauren Murphree Assistant Criminal District Attorney Lubbock County Criminal District Attorney's Office P. O. Box 10536 Lubbock, Texas 79408 806-775-1100 Fax: 806-775-7930 ***Trial Judge:*** Honorable Douglas H. Freitag, Presiding Judge 140th District Court of Lubbock County, Texas Lubbock County Courthouse 904 Broadway, Suite 349 Lubbock, TX 79401

STATEMENT REGARDING ORAL ARGUMENT

This petition presents three unsettled issues important to the jurisprudence of the state of Texas and one settled issue (in Texas) that should be reviewed. Oral argument will help to better frame the issues. Appellant's positions are as follows:

1. Where the state pleads a negative, such as "not in a single criminal transaction," it must not only prove that negative but also provide the jury with adequate (not too vague) criteria for the lay jury to distinguish between more than one criminal transaction and "the same scheme or course of conduct."
2. Our usual accomplice witness jury instructions disparage the presumption of innocence by repeatedly implying that the defendant is guilty as charged.
3. Our usual accomplice witness jury instructions comment on the weight of the evidence by repeatedly implying that the defendant is guilty as charged to the egregious harm to the Appellant.
4. Texas should adopt the rule of 48 other states and the federal courts that give the trial court the discretion to *briefly* caution jurors about testimony of witnesses with an interest in the outcome of the case.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Nature of the Case	A grand jury returned an indictment against Appellant that alleged that in Lubbock County, Texas, Mark Bethel, hereafter styled the Defendant, heretofore on or about the 31st day of October, A.D. 2015, did then and there intentionally or knowingly cause the death of an individual, namely, Jessica Payton, by shooting her, and on the 31st day of October 2015, did then and there intentionally and knowingly cause the death of another individual, Shawn Summers by shooting him, and both murders were committed pursuant to the same scheme or course of conduct, but during different criminal transactions.
Trial Court	The Honorable Douglas Freitag, presiding over the 140th Judicial District Court of Lubbock County, Texas.
Course of the Proceedings and The Trial Court's Disposition of the Case	On November 5, 2021, a jury found Appellant guilty of capital murder in trial court No. 2021423232 rather than the lesser included offense of murder also submitted to the jury. CR 532, 546. The judge assessed punishment at life in prison without parole. CR 546 Appellant filed a Notice of Appeal on November 29, 2021, per case events section of the website of the Seventh Court of Appeals. That same website shows that Appellant filed his opening brief to the Seventh Court of Appeals on September 21, 2022. The state filed its brief on November 14, 2022. Appellant filed his reply brief on January 10, 2023. The court of appeals affirmed the case in its opinion filed March 8, 2023. After extension, Appellant filed his motion for rehearing on April 3, 2023. The website for the Seventh Court of Appeals shows that its opinion will be published by West

	Publishing Co. Appellant requested this Court for a 30-day extension of time to file his petition for discretionary review. This Court extended the time for filing the petition until July 17, 2023.

GROUNDS FOR REVIEW

Ground One-A. Thru E. **Vague Aggravator**. In this capital murder case, the Court of Appeals erred in overruling Appellant's vagueness charge objection directed at the trial court's refusal to closely track the statute or include in its charge to the jury a clear and understandable distinction between a) murder *NOT* committed in a single criminal transaction and b) a murder committed in the same scheme or course of conduct, but during different criminal transactions. CR 531-534 This error resulted in some and/or egregious harm.

> Should this Court require trial courts to provide lay jurors with a reasonable and adequate way to distinguish between two apparently overlapping but counterposed statutory capital sentencing aggravators found in the same indictment and jury charge that did not closely track the statute?

Yes.

Ground Two. Did the Court of Appeals err in holding that the evidence is sufficient to establish that the murders did not take place in a single transaction but did take place in the same scheme or course of conduct, but during different criminal transactions?

Yes.

(The body of evidence falls short of establishing the aggravating elements set forth in the application paragraphs of the court's charge at CR 531-534)

Ground Three-A. Thru E. On state statutory and federal 14th Amendment due process grounds, the Court of Appeals erred in declining to find egregious harmful error in the trial court's somewhat freehand extra-statutory charge to the jury on accomplice witness testimony. CR 527-529

A. The Court of Appeals erred when it failed to find egregiously harmful error in the trial court's freehand charge to the jury that disparaged the statutory and constitutional presumption of innocence by repeatedly implying that appellant was definitely complicit with Dave Bethel and maybe complicit with Kristin Theony in the murder of the named victims.
B. The Court of Appeals erred when it failed to find egregiously harmful error in the trial court's freehand charge to the jury that commented on the weight of the evidence by implying that appellant was definitely complicit with Dave Bethel and maybe complicit with Kristin Theony in the murder of the named victims.
C. The Court of Appeals erred in holding that no egregious harm resulted from the trial court's implication in its freehand charge to the jury that Appellant was guilty because he had an accomplice as a matter of law, Dave Bethel, and a maybe accomplice, Kristin Theony, to the murder of the named victims.
D. The Court of Appeals erred in holding that the trial court did not disparage the presumptions of innocence in its freehand charge to the jury or cause appellant egregious harm because the charge conditioned its implication of Mr. Bethel's guilt on a jury finding that the obvious murders did occur by someone.
E. The Court of Appeals erred in holding that the trial court did not err or cause appellant egregious harm by instructing the jury that Appellant had an accomplice as a matter of law and a maybe accomplice as that term was defined in the freehand extra-statutory charge.

Ground Four. Forty-eight states allow or even require cautionary instructions directed at interested witness testimony where appropriate. To Appellant's egregious harm and detriment

in this accomplice witness-dependent case, the court of appeals declined to find egregious error in the trial court's charge that does not include any such cautionary instruction. CR 525-542.

Should Texas revisit its rule prohibiting such instructions where, as here, the state heavily relies on corrupt and interested sources of testimony?

Yes.

ARGUMENT AND REASONS FOR REVIEW

Argument and Reasons For Review in Support of Ground One.

Ground 1-A. The court below erred in holding that jurors may assign any meaning found in common parlance to terms not defined in the statute. See the opinion on pages 6-8. The vagueness doctrine developed under the Due Process Clause of the Fourteenth Amendment requires the trial court to guide the discretion of the deliberating jurors such that the mandatory minimum life without parole sentence is only imposed in the limited circumstances contemplated by the legislature.

Ground 1-B. Did the Court of Appeals err in treating Appellant's vagueness complaint, made at the charge conference, as one directed at the capital murder statute rather than the jury charge?

Yes.

The timing and the nature of the objection made it clear that Mr. Bethel's complaint was directed at the vague and confusing jury charge that conflated two statutory sentence aggravators. The trial judge understood that because he asked for clarifying language for the charge. See RR. V. 11 P. 89-90 and RR. V. 12 P. 12-13.

Ground 1-C. Did the Court of Appeals err in treating Appellant's vagueness charge objection as inadequate to preserve a federal constitutional due process jury charge claim for review in that court?

Yes.

Contrary to the court of appeals' opinion at page 8, trial counsel's objection that the sentence aggravator was "too vague" was adequate to invoke a well-known and well-developed body of constitutional law. See AGA. *"The Void-for-Vagueness Doctrine in the Supreme Court."* University of Pennsylvania Law Review (1960): 67-116 and Zydney Mannheimer, Michael J. "*Vagueness as Impossibility*." Tex. L. Rev. 98 (2019): 1049.

Ground 1-D. Did the Court of Appeals err in treating Appellant's vagueness charge objection as inadequate to preserve a federal constitutional due process jury charge claim for Almanza review for egregious harm?

Yes.

Mr. Bethel's "too vague" charge objection was adequate to put the court and the state on notice of the nature of his complaint. *French v. State*, 563 S.W.3d 228, 235 (Tex. Crim. App. 2018). Jury charge claims resulting in egregious harm may be raised for the first time on appeal, even if supported by the state or federal constitution. *Ngo v. State*, 175 S.W.3d 738, 743, 752 (Tex. Crim. App. 2005). This is not a case where

an appellant's real complaint is with the statute itself but the bungling of the charge by the trial court and the refusal of the court of appeals to recognize and correct egregious charge error.

> **Ground 1-E.** Inadequate description of sentencing aggravator. By pleading that the two murders did *not* take place in a single transaction, did the state take on the burden of actually proving that the two murders did *not* take place in a single transaction? Was the state required to prove this counterposed element beyond a reasonable doubt?

Yes, under the constitutional principles that underlay the opinions of the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *in re Winship*, 397 U. S. 358, 364 (1970).

Argument in Support of Ground One-Vague Aggravator.

Mr. Bethel was prosecuted under Texas Penal Code § 19.03(a)(7) providing for a mandatory minimum life without parole sentence upon conviction for the murder of more than one person:

> (A) during the same criminal transaction; or
> (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

In this case, the state chose to prosecute under theory B alleged in the disjunctive *but affirmatively not A.* (CR 17) Undersigned counsel argues that, applying the usual rules of eighth grade grammar with which jurors should be familiar, the state was required to prove its

allegation that the two murders did *not* take place in the same criminal transaction, even if (hypothetically) there was adequate proof that the two murders took place pursuant to the same scheme or course of conduct. Mr. Bethel argues that this charging option, evident in the final phrase of the indictment ("but during different criminal transactions") (CR 17) chosen by the state heightened the need for a definitional instruction to the lay jurors to make sure they had adequate criteria to decide not only whether theory (B) was proven, but also whether theory (A) was disproven by the state. Despite defense counsel's timely objection that this part of the charge was too vague, (RR V. 12 P. 13 L. 15-18.) the trial court gave the lay jurors no clarifying instruction. See the Court's Charge commencing at CR 525, especially pages 526 and the application paragraph at 531-532.

Appellant raised this issue as Point of Error One in his opening brief to the court of appeals commencing at page 32. The state responded to Appellant's first point of error in its initial brief commencing at page 32 by asserting that there was no vagueness and no need to define the statutory terms in question, that Appellant's trial objection was not adequate to raise a constitutional jury charge issue, even though it was

made at the charge conference. The state somehow believes that the vagueness objection was directed at any prosecution under the entire section of the statute, not just this one, and that Mr. Bethel did not suffer egregious *Almanza* harm. Appellant asks this Court to compare his situation with that in *Garcia v. State,* No. 02-21-00203-CR (Tex. App. Nov. 23, 2022)(pet. ref.) where the court of appeals held that the appellant's complaint was actually with the statute itself rather than the jury charge because, unlike here, the charge closely tracked the statute.

The court of appeals decided that there was no error at all in the trial court's refusal to cure the vagueness raised by counsel for Mr. Bethel at the charge conference and did not conduct any harm analysis. See the opinion on pages 5-8. The court of appeals decided that Mr. Bethel's vagueness objection was inadequate to raise a constitutional issue and therefore rejected his claim on that ground. Opinion on page 8.

Mr. Bethel raised this issue again by motion for rehearing in the court of appeals to no avail.

Reasons For Review in Support of Ground One

> The court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States.

Appellant briefed this issue in his opening brief to the court of appeals at pages 32-51, suggesting language from this Court's opinions that would have served to clarify the operation and effect of the sentence aggravator. See also *Curry v. State*, 30 S.W.3d 394 (Tex. Crim. App. 2000) describing exceptions to the surplusage argument that apply when the unnecessary matter is descriptive of that which is legally essential to charge a crime. In *Upchurch v. State*, 703 S.W.2d 638, 641 (Tex.Crim.App.1985), this Court explained that extra language is "descriptive" of an element of the offense if it "define[s] the offense more narrowly, place[s] it in a specific setting, or describe[s] the method by which it was committed." Such language "must be proven as alleged, even though needlessly stated."

See also the Supreme Court case of *Apprendi v. New Jersey* , supra citing *in re Winship* supra, holding that the state must prove each element of the offense to the jury and beyond a reasonable doubt. See Daryl Kessler, *Eighth Amendment--Sentencer Discretion in Capital Sentencing Schemes,* 84 J. Crim. L. & Criminology 827 (Winter 1994) citing *Gregg v. Georgia* 428 U.S. 153 (1976) (plurality opinion) holding that vague capital sentencing aggravators may be clarified by a trial

court's jury instructions without striking down the statute itself and *Godfrey v. Georgia* 446 U.S. 420 (1980), holding that the trial judge in that case failed to articulate a narrowing construction, thus the death sentence was imposed in contravention of the constitution.

Argument and Reasons For Review in Support of Ground Two.
Ground Two, Re-stated.

> Did the Court of Appeals err in holding that the evidence is sufficient to establish that the murders did not take place in a single transaction but did take place in the same scheme or course of conduct, but during different criminal transactions?

Yes.

> (The body of evidence falls short of establishing the aggravating elements set forth in the application paragraphs of the court's charge at CR 531-534)

The rendition of the facts of this case presented at pages 5-8 of the opinion of the court of appeals reveals that the court below relied upon an ambiguous body of circumstantial evidence largely from corrupt sources tending to favor the state's conviction. There are good record-based reasons to doubt the truthfulness of this verdict. Suffice it to say in this petition that there is no confession, no eyewitness, just ambiguous circumstantial evidence boosted by the trial court's written charge

designating Dave Bethel as an accomplice as a matter of law, which carried the near-necessary implication that the two Bethels were partners in the crime charged. A close reading of the opinion of the court below shows how heavy was the state's reliance on the interested testimony of "for sure" accomplice Dave Bethel and "maybe" accomplice Ms. Theony.

Reasons For Review of Ground Two-Sufficiency of the Evidence that the two murders did not take place in a single Criminal Transaction.

> The court of appeals' decision conflicts with another court of appeals' decision that holds that the state must prove a pleaded negative.
>
> See *Williams v. State*, 410 S.W.3d 411 (Tex. App. 2013), citing *Upchurch*, supra.

The court of appeals has decided an important question of state or federal law (whether a pleaded *sentence aggravator* that contains a negative element must be proven to the jury by the state) that has not been, but should be, settled by the Court of Criminal Appeals.

> The court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States.
>
> See *Williams* and *Upchurch*, supra, denoting the exception to the mere surplusage argument.

See also *Godfrey* supra, holding unconstitutional the use of vague language that did not help sentencing juries avoid arbitrary and capricious infliction of an aggravated sentence.

Argument and Reasons For Review in Support of Grounds Three-A through E.

On state statutory and federal Due Process 14th Amendment grounds, the Court of Appeals erred in declining to find egregiously harmful error in the trial court's charge to the jury on accomplice witness testimony. CR 527-529

A. The Court of Appeals erred when it failed to find egregiously harmful error in the trial court's charge to the jury that disparaged the presumption of innocence by repeatedly implying that appellant was definitely complicit with Dave Bethel and maybe complicit with Kristin Theony in the murder of the named victims.
B. The Court of Appeals erred when it failed to find egregiously harmful error in the trial court's charge to the jury that commented on the weight of the evidence by implying that appellant was definitely complicit with Dave Bethel and maybe complicit with Kristin Theony in the murder of the named victims.
C. The Court of Appeals erred in holding that no egregious harm resulted from the trial court's implication in its charge to the jury that Appellant was guilty because he had an accomplice as a matter of law, Dave Bethel, and a maybe accomplice, Kristin Theony, to the murder of the named victims.
D. The Court of Appeals committed egregiously harmful error in holding that the trial court did not disparage the presumption of innocence in its charge to the jury because the charge

conditioned its implication of Mr. Bethel's guilt on a jury finding that the obvious murders did occur by someone.

E. The Court of Appeals erred in holding that the trial court did not commit egregiously harmful error in instructing the jury that Appellant had an accomplice as a matter of law and a maybe accomplice as that term was defined in the charge.

Reasons For Review of Ground Three A through E.

A. The court of appeals decided an important question of state and federal law when it rejected the argument that the trial court's charging the jury that the defendant was a person who acted with an accomplice in the very case at bar disparaged the statutory and constitutional presumptions of innocence.

An accomplice, in common parlance, and according to the trial court's definition in the jury charge is a partner in crime. At least one juror must have believed that Mark Bethel was a partner in the crime on trial with Dave and maybe Kristin on the basis of the trial court's non-statutory freehand definition of an accomplice and with the resulting evidentiary boost in the court's charge. This is not neutral and offends the principles followed by the court below in *Alfred v. State*, No. 07-21-00226-CR (Tex. App. Sept. 1, 2022) (no. pet.), citing this Court's opinion in *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003). Texas reviewing courts assess jury charge claims in the light favorable to the defendant's complaint. *Bufkin v. State*, 207 S.W.3d 779 (Tex. Crim. App. 2006). Appellant

contends that this disparagement of the state and federal presumptions of innocence denied him a fair and impartial trial by making a case for conviction clearly and significantly more persuasive, and this requires reversal. See e. g. *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011).

Tex. Code Crim. Proc. Ann., Art. 2.03(b) states in pertinent part:

> "[I]t is the duty of the trial court, the attorney representing the accused, the attorney representing the state and all peace officers to so conduct themselves as to insure a fair trial for both the state and the defendant, not to impair the presumption of innocence....

B. This jury charge issue has not been, but should be, settled by the Court of Criminal Appeals.

Shackling the defendant and presenting him to the jury in jail clothes is a trial error (disparaging the presumption of innocence) requiring a contemporaneous objection. See *Randle v. State*, 826 S.W.2d 943 (Tex. Crim. App. 1992). But such disparagement in the court's extra-statutory freehand charge can be raised under Almanza for the first time on appeal. See *Ngo* and *French,* supra. Compare this situation with that presented in *Garcia* supra, where the charge so closely tracked the

statute that the court held that, unlike here, the complaint was not with the charge but with the statute itself.

C. The court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States.

See *Taylor v. Kentucky*, 436 U.S. 478 (1978) holding that the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice, citing *Estelle v. Williams,* 425 U.S. 501, 503 (1976).

D. Other courts of appeal have held that a constitutional issue may be raised for the first time on appeal via the Almanza line of cases. See *French, Ngo, Garcia* supra.

E. The court of appeals has misconstrued a statute, when it implicitly decided that Texas CCP art 36.14-19 trumped the more specific Tex. Code Crim. Proc. Ann., Art. 2.03(b).

F. In the two-judge majority opinion in *Erevia v. State* No. 07-22-00143-CR (Tex. App. Apr. 6, 2023), the two justices of the Seventh Court of Appeals apparently have disagreed with the third justice on a material question of law necessary to this Court's decision in this case raising virtually the same jury charge issues, to wit: the disparagement of the presumption of innocence and the failure to caution the jurors about testimony coming from witnesses that may have an interest in the outcome of the case.

G. The court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a

> departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

On page 13 of its opinion, the court of appeals treats Mark Bethel's point of error as a complaint that Dave Bethel's out of court statement was unduly emphasized by the trial court in its charge. That was not the gravamen of Mark's complaint. What Mark was and is concerned about is that the trial judge's charge definitely and positively called Dave Bethel Mark's *accomplice* over and over, implying that Mark and Dave (and maybe Kristin) were, in fact, partners in the crime on trial. CR 527-529 No matter how well intended, the corroboration jury instructions drastically disparaged the presumption of innocence in contravention of Tex. Code Crim. Proc. Ann., Art. 38.03 and Tex. Code Crim. Proc. Ann., Art. 2.03(b), as well as the constitutional presumption of innocence under *Taylor v. Kentucky*, supra.

Argument and Reasons For Review in Support of Ground Four.

> Forty-eight states allow or even require cautionary instructions directed at interested witness testimony where appropriate. The court's charge does not include any such cautionary instruction. CR 525-542.

Should Texas revisit its rule prohibiting such instructions where, as here, the state heavily relies on corrupt and interested sources of testimony?

Yes.

Reasons For Review of Ground Four

> The court of appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals.

This Court has not faced the precise question whether Texas should remain an outlier state regarding the discretion of our trial judges to instruct jurors about the need for greater care and caution in receiving and considering the testimony of witnesses interested in the outcome of the case. See Appellant's Reply Brief to the court below citing *Banks v. Dretke* 540 U.S. 668, 124 S. Ct. 1256 (2004) and Appendix One attached to this petition describing the jurisprudence of forty-eight states that permit or even require trial judges to instruct jurors to exercise greater care in considering the testimony of interested witnesses.

The court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States. See *Banks v. Dretke* 540 U.S. 668,

124 S. Ct. 1256 (2004) and appellant's attached Appendix One describing the law of 48 other states that allow or even require a cautionary instruction directed at the testimony of interested witnesses.

The court of appeals has misconstrued Texas CCP art. 38.14 and art 36.14-19. The rules against comment on the weight of the evidence ought not trump the more specific mandate of Tex. Code Crim. Proc. Ann., art. 2.03(b) requiring the statutory presumption of innocence to be affirmatively preserved and protected.

In this case, the justices of the Amarillo court of appeals have disagreed on a material question of law necessary to the court's decision as did the two-judge majority opinion in *Erevia v. State*, supra. The one *Erevia* judge may well have agreed with Erevia's arguments which are virtually the same as those of Mr. Bethel here.

The court of appeals has so far departed from the accepted and usual course of judicial proceedings in 48 other states and the federal courts, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

See e.g., *Banks v. Dretke,* 540 U.S. 668, 701-702, 124 S. Ct. 1256 (2004) which, in granting habeas relief, noted that the *Banks* deliberating

jury did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants. The *Banks* court noted that Supreme Court has long recognized the "serious questions of credibility" informers pose, citing *On Lee v. United States*, 343 U. S. 747, 757 (1952) and Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses,* 47 Hastings L. J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable … ."). The Banks court noted that the Supreme Court has allowed defendants "broad latitude to probe [informants'] credibility by cross-examination" and the high court counseled submission of the credibility issue to the jury *with careful instructions*. *On Lee*, 343 U. S., at 757; accord, *Hoffa v. United States*, 385 U. S. 293, 311–312 (1966). See also Neuschatz, Jeffrey S., et al. *"The effects of accomplice witnesses and jailhouse informants on jury decision making*." Law and Human Behavior 32 (2008): 137-149.

PRAYER FOR RELIEF

Appellant prays that this Court grant discretionary review, reverse the judgment of the Seventh Court of Appeals, issue a judgment

of complete acquittal pursuant to ground two, or, if such relief is not granted, remand this cause to the trial court for further proceedings to decide whether or not Appellant is guilty of the lesser included offense of murder, and if only some of the above relief is granted, Appellant prays for a remand to the trial court to cure the jury charge errors described in grounds three and four in a manner consistent with this Court's opinion reversing and remanding for these purposes.

Respectfully submitted,

By: /s/ John E. Wright

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CERTIFICATE OF SERVICE

I, John E. Wright, certify that on July 17, 2023, a copy of this petition was served on opposing counsel, Jeff Ford of the Lubbock County Criminal District Attorney's Office, via the email address opposing counsel has listed with the state electronic-filing service provider and on the State Prosecuting Attorney, information@spa.texas.gov Austin, Texas via the state electronic filing service provider.

/s/ John E. Wright

John E. Wright

CERTIFICATE OF COMPLIANCE

I certify the foregoing Petition for Discretionary Review complies with Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure. The petition, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 4200 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/ John E. Wright
John E. Wright

APPENDIX ONE:

DESCRIPTION OF THE LAW OF FORTY-EIGHT STATES THAT ALLOW OR REQUIRE A CAUTIONARY INSTRUCTION DIRECTED AT THE TESTIMONY OF INTERESTED WITNESSES

APPENDIX ONE

Alphabetic list of the 50 U.S. states with descriptions of their rules regarding witness cautionary instructions in criminal cases. The rules of the fifty states do not fit neatly into strict, discrete categories.

The list below shows that many states caution juries about witnesses with an interest in the outcome of a case in their general witness credibility instructions. Texas courts do not usually use such witness credibility instructions because of Texas' strict rule against comment on the weight of evidence. Only Texas and Kentucky do not caution juries about witnesses with an interest in the outcome of a case.

Alabama.
Lee v. State, 562 So. 2d 657 (Ala. Crim. App. 1989)
State v. Hankins, 155 So. 3d 1048 (Ala. Crim. App. 2013).

Alaska.
WITNESSES – CREDIBILITY 1.10-Covers interest in outcome.

Arizona.
State v. Ricci, No. 1 CA-CR 19-0194 (Ariz. Ct. App. Mar. 25, 2021). Standard witness credibility instructions deemed adequate.
Martin v. State, 410 P.2d 132 (1966)

Arkansas.
Williams v. State, 801 S.W.2d 296 (1990). The general instructions caution jurors about witness interests in the outcome of a case.

California.
CALCRIM No. 335. Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or]testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence

Colorado.
People v. Petschow, 119 P.3d 495 (Colo. App. 2004) Only for uncorroborated accomplice testimony.

Connecticut.
State v. Moore, 293 Conn. 781, 981 A.2d 1030 at 1059-60 (Conn. 2009) Discretionary.
State v. Jones, 254 A.3d 239, 337 Conn. 486 (2020). Interest covered in general credibility instruction

Delaware.
McCoy v. State, 112 A.3d 239 at 268 (Del. 2015)

Florida
Dennis v. State, 817 So.2d 741 at 751 (Fla. 2002) Discretionary
Varnum v. State, 137 Fla. 438, 449, 188 So. 346, 351.
Alvarez v. State, 890 So. 2d 389 (Fla. Dist. Ct. App. 2004). Standard instruction on interest in outcome adequate.

Georgia
Ladson v. State, 285 S.E.2d 508, 248 Ga. 470 (1981). General witness credibility instruction deemed adequate. See 1.31.10 … their interest or lack of interest in the outcome of the case, and their personal credibility as you observe it.

Hawaii
State v. Okumura, 78 Haw. 383, 894 P.2d 80, at 105 (Haw. 1995) Discretionary.

Idaho
The propriety of giving a cautionary instruction on the credibility of a witness is a matter for the discretion of the trial court.
75 Am.Jur.2d Trial § 682, p. 632 (1974)
State v. Radabaugh, 93 Idaho 727, 471 P.2d 582 (1970)
State v. Puckett, 88 Idaho 546, 401 P.2d 784 (1965)
State v. Dunn, 91 Idaho 870, 434 P.2d 88 (1967)

Illinois.
People v. Cobb, 97 Ill. 2d 465, 455 N.E.2d 31, 35, 74 Ill. Dec. 1 (Ill. 1983)

Indiana.
The long-standing rule in Indiana has been that any agreement of leniency regarding an accomplice who testifies for the State must be disclosed to the jury, but that a cautionary instruction regarding that witness' credibility need not be given.

Newman v. State, 263 Ind. 569, 334 N.E.2d 684, 688 (1975)
Morgan v. State, 275 Ind. 666, 419 N.E.2d 964, 968-69 (1981)
Dulworth v. State, No. 35A02-1711-CR-2784 (Ind. Ct. App. May 14, 2018). General instructions cover interest in outcome of case.

Iowa.
State v. Kraai, No. 19-1878 (Iowa Ct. App. Apr. 14, 2021). General instructions cover witness interest in outcome at fn 6.

Kansas.
State v. Saenz, 271 Kan. 339, 346, 22 P.3d 151 (2001) Discretionary.

Kentucky.
Wright v. Commonwealth (2012), No. 2011–SC–000191–MR
West v. Com., 161 S.W.3d 331 (2004)
Kentucky does not use cautionary instructions.

Louisiana.
State v. Hughes, 943 So.2d 1047, 1051 (La. 2006) Discretionary.

State v. Tate, 851 So. 2d 921 (La. 2003). General instructions on interest in outcome deemed adequate.

Maine.
State v. Johnson, 434 A.2d 532, 537 (Me. 1981) Discretionary.

Maryland.
Preston v. State, 96 A.3d 800 (2014) 218 Md. App. 60 General instructions covered interest in outcome of case.

Massachusetts.
Commonwealth v. Webb, 468 Mass. 26, 8 N.E.3d 270 (2014). Model instructions cover interest in outcome.

Michigan
State v. Mcintosh No. A17-0920 (Mich. Ct. App. June 18, 2018)
People v. Young, 472 Mich. 130, 693 N.W.2d 801 at 807-08 (Mich. 2005) On request.

Minnesota
State v. Thoresen, 921 N.W.2d 547 (Minn. 2019). General instructions on interest, etc. Found adequate.

Mississippi
Mississippi Model Jury Instruction - Criminal 1:14. *Smith v. State*, 907 So. 2d 292, 298 (Miss. 2005)
Jones v. State, 283 So. 3d 64 (Miss. 2019)

Missouri
State v. Fields, 624 S.W.3d 414 (Mo. Ct. App. 2021)
State v. Lucas, 559 S.W.3d 434 (Mo. Ct. App. 2018). General witness instructions adequate.

Montana
State v. Wells, 485 P.3d 1220, (2021). General witness credibility instructions on interest in outcome deemed adequate.

The jury members were instructed that they were the "sole judges of the credibility or believability of all the witnesses testifying in this case" and that they were to "be fair, impartial and not arbitrary or close-minded." The jury was instructed that it could assess factors related to witness demeanor, potential bias, other witness testimony, and potential false and mistaken testimony in assessing each witness's believability. See *State v. Marble*, 2005 MT 208, Pgs. 27-28, 328 Mont. 223, 119 P.3d 88 (upholding jury instructions on assessing witness credibility including interest in the outcome of the case).

Nebraska.
State v. Quintana, 261 Neb. 38, 621 N.W.2d 121, 139 (Neb. 2001)
State v. Sierra, 939 N.W.2d 808, 305 Neb. 249 (2020). On request.

Nevada.
In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness; the extent of his opportunity and ability to see or hear or otherwise become aware, and to remember and communicate; the interest of the witness in the outcome of the case, if any; the existence or non-existence of a bias or other motive; the inclination of the witness to speak truthfully or not; the probability or improbability of the statements of the witness; a statement previously made by him or her that is inconsistent with his or her testimony; evidence of the existence or non-existence of any fact testified to by him; and all other facts and circumstances in evidence.

New Hampshire.
State v. Knight, 13 A.3d 244 (N.H. 2011)

New Jersey.
State v. Adams, 194 N.J. 186, 943 A.2d 851 at 864 (N.J. 2008) On request.

New Mexico.
State v. Martinez, 478 P.3d 880, 2021 N.M.S.C. 2 (2020). Federal court inspired instructions refused; general state court instructions on witness interest in outcome deemed adequate.

New York.
Model jury instructions include:
-Interest/Lack of Interest

You may consider whether a witness has any interest in the outcome of the case, or instead, whether the witness has no such interest.

North Carolina.
State v. Rowsey, 343 N.C. 603, 472 S.E.2d 903, 911 (N.C. 1996) On request.

North Dakota
State v. Lind, 322 N.W.2d 826 (N.D. 1982). Other instructions deemed adequate as cautionary.

A specific instruction on the testimony of an accomplice, similar to that requested by *Lind*, would not be improper [*State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974)], but in view of the instructions given it was not prejudicial error to refuse to give *Lind's* requested instruction. *State v. Smith*, 88 N.M.App. 541, 543 P.2d 834 (1974); contra, *State v. Beene*, 257 N.W.2d 589 (S.D.1977).

Ohio
State v. Lett, 2005 Ohio 1308 (Ct. App. 2005). accomplice cautionary instruction required.
State v. Dotson, 139 N.E. 3d 430, 2019 Ohio 2393 (Ct. App. 2019). same

Oklahoma
Fuston v. State, 470 P.3d 306, (Okla. Crim. App. 2020). General witness instructions adequate.

Oregon
State v. Oatney, 66 P.3d 475, 335 Or. 276 (2003).

ORS 10.095(4)[8] sets out the additional rule that a court should instruct a jury that it should view with distrust the testimony of an accomplice. To implement those statutory requirements, a trial court instructs the jury that it should view an accomplice's testimony with distrust and that it cannot convict on the basis of accomplice testimony alone.

Pennsylvania
Commonwealth v. Bernal, No. 258 MDA 2020 (Pa. Super. Ct. Jan. 21, 2021), citing *Commonwealth v. Slyman*, 483 A.2d 519 (Pa.Super. 1984),
Pennsylvania Suggested Standard Criminal Jury Instruction 4.01 provides as follows:
4.01 ACCOMPLICE TESTIMONY
* * *
3. These are the special rules that apply to accomplice testimony:

First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source.
Second, you should examine the testimony of an accomplice closely and accept it only with care and caution.

Rhode Island.
State v. Fenner, 503 A.2d 518 (1986). General credibility instructions deemed adequate.

You are allowed to determine whether you feel that witness, any witness now who took the stand, had any prejudice or bias for or against either side. You are entitled to determine whether the witness would have a motive to tell the truth or a motive to lie. You are allowed to ask yourself, `Well, why would a witness lie? Why would a witness tell the truth.'

It is a familiar rule in this jurisdiction that a trial justice is not required to give specific instructions requested by a party so long as the charge of the trial justice adequately covers the subject matter relating to the request. *State v. Appleton*, ___ R.I. ___, 459 A.2d 94 (1983); *State v. Manning*, ___ R.I. ___, 447 A.2d 393 (1982); *State v. Ahmadjian*, ___ R.I. ___, 438 A.2d 1070 (1981).

South Carolina.
State v. Wright, 237 S.E.2d 764, 269 S.C. 414 (1977). Discretionary; general credibility instructions deemed adequate.

South Dakota.
State v. Beene, 257 N.W.2d 589 (SD: Supreme Court 1977). In *State v. Douglas*, 70 S.D. 203, 225, 16 N.W.2d 489, 499-500 (1944), "where the testimony of the accomplice [was] necessary to establish facts essential to defendant's guilt" this court (per Bakewell, J.) held that the defendant's requested instruction "as to the duty of the jury to examine [the accomplice's] testimony with great care and caution before accepting it as true" should have been given.

Tennessee.
State v. Patton, No. M2020-00062-CCA-R3-CD (Tenn. Crim. App. May 19, 2021). General instructions on fairness and bias.

State v. Hutchison, 898 S.W.2d 161 (Tenn. 1994). Cautionary not required where corroborated.

Texas.

Utah.
State v. Guzman, 2004 UT App 211, 95 P.3d 302, 312 (Utah App. 2004) Discretionary.

Vermont.
State v. Reed, 253 A.2d 227, 127 Vt. 532 (1969).
When an accomplice is induced, by hope of favor, to testify against his partner in an offense, his credibility may be adversely affected. And it is customary and proper for the court to caution the jury to this effect. *State v. Crepeault*, 229 A.2d 245 (1967)

Virginia
Holmes v. Commonwealth, Record No. 0250-22-3 (Va. Ct. App. Nov. 22, 2022).
T]he danger of collusion between accomplices and the temptation to exculpate themselves by fixing responsibility upon others is so strong that it is the duty of the court to warn the jury against the danger of convicting upon their uncorroborated testimony." *Jones v. Commonwealth*, 111 Va. 862, 868 (1911). Moreover, "[I]f two or more accomplices are produced as witnesses, they are not deemed to corroborate each other . . . and the same confirmation is required[] as if there were but one." Id. (quoting 1 Greenleaf on Evidence § 381 (15th ed.)); see also *Via v. Commonwealth*, 288 Va. 114, 115 (2014)

Washington
Model cautionary instruction cited with approval in *State v. Statler*, 160 Wn.App. 622, 248 P.3d 165 (2011) and *State v. Murphy*, 98 Wn.App. 42, 47 n.5, 988 P.2d 1018 (1999).

West Virginia
State ex rel. Franklin v. McBride, 226 W. Va. 375, 701 S.E.2d 97, 103, n.14 (W. Va. 2009) On request.

Wisconsin

State v. Coleman, 2021 W.I. App 10, 954 N.W.2d 745 (Wis. Ct. App. 2021). Discretionary.

Accomplice testimony raises due process concerns when the accomplice receives concessions for testifying. A defendant's right to a fair trial is safeguarded by (1) a disclosure of the agreement between the State and the accomplice; (2) opportunity for cross-examination; and (3) "instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the [S]tate to testify against the defendant." *State v. Nerison*, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987).

Wyoming

Chavez-Becerra v. State, 924 P.2d 63 (Wyo. 1996). A cautionary instruction should be given regarding accomplice testimony.

APPENDIX TWO: COURT OF APPEALS'S OPINION

Bethel v. State, _____ S. W. 3d _____ No. 07-21-00297-CR, 2023 WL 2402355, (Tex. App. – Amarillo Mar. 8, 2023, no pet. h.) (designated for publication)

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00297-CR

MARK BETHEL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 140th District Court
Lubbock County, Texas
Trial Court No. 2021-423232, Honorable Douglas H. Freitag, Presiding

March 8, 2023

OPINION

Before QUINN, CJ., and PARKER and YARBROUGH, JJ.

A jury found Appellant, Mark Bethel, guilty of capital murder by murdering more than one person pursuant to the same scheme or course of conduct.[1] Appellant was sentenced to life imprisonment without parole. In this appeal, Appellant raises issues relating to jury charge error, sufficiency of the evidence, comments on the weight of the evidence, and cautionary instructions. We affirm the judgment of the trial court.

[1] *See* TEX. PENAL CODE ANN. § 19.03(a)(7)(B).

BACKGROUND

In the summer of 2015, Appellant moved into a house at Buffalo Springs Lake, near Lubbock. Not long after, Appellant's cousin, David Bethel, along with his girlfriend, Kristina Theony, came to live in the home. Appellant soon began dating Jessica Payton, who also moved in with him. Around September of 2015, David[2] and Theony moved into a mobile home near 86th Street and Ash Avenue in Lubbock.

One early morning in October of 2015, Appellant woke to find Payton gone. He discovered that Payton had taken some of his money and was having an affair with a man named Shawn Summers. On October 25, Appellant sent numerous text messages to Payton expressing anger at her actions, telling Payton he had loved and trusted her, but that he now hated her. On Monday, October 26, Appellant told one of his neighbors that Payton had left him and taken some of his things. The neighbor testified that Appellant looked hurt and brokenhearted. He and his wife took a meal to Appellant later that day. Appellant, David, and Theony were all at Appellant's house. When the neighbor went inside the house, David showed him his 9mm Ruger pistol.

Sometime in the week before Halloween, David and Theony hosted a cookout, attended by Appellant, his sister, and his teenaged niece, at their mobile home. Appellant's niece noticed that Appellant seemed upset rather than his usual lighthearted self. She heard David tell Appellant, "We'll get them back," which she understood was an effort to lighten Appellant's mood.

[2] Because Appellant and David Bethel share a last name, we will refer to David Bethel by his first name only to avoid confusion.

Theony testified that, in this same time period, she heard Appellant and David discuss trying to find Payton. She also heard Appellant say, "I want to kill that b****." David responded that if Appellant did not do it, he would do it himself.

Appellant and Payton reconnected on October 26. Summers and his sister saw the couple driving into Buffalo Springs Lake on the neighborhood's sole road. On Tuesday, October 27, Appellant texted Payton again, stating that he loved her and that it was good to see her. He told her he would see her the following day. On October 28, he sent her a text saying, "I will be there at lunch time." Appellant clocked out of work at 12:20, picked up Payton, and drove to Buffalo Springs Lake. Payton's cell phone pinged off a cell tower at Buffalo Springs Lake at 1:02 p.m. Her cell phone had no more outbound activity after October 28.

That same day, a neighbor heard a man's voice coming from Appellant's house yell, "Shut up." The yelling was followed by four pops "like a pistol gunfire."[3] The neighbor saw the curtain on Appellant's patio door move back, then saw a man look to the left and the right. Within 15 to 30 minutes, the neighbor saw Appellant's truck drive away from the house. Appellant made a phone call to David at 1:20 p.m. and clocked back in to work at 1:37. Several hours after hearing the gunfire, the neighbor called the chief of police at Buffalo Springs Lake to report the incident. Around 5:00 or 5:30 that evening, the neighbor saw Appellant's truck, along with David's truck, back at the house.

[3] The neighbor testified that he did not know the exact time he heard the gunshots. He initially told the police he thought it was around 2:00 or 2:30.

On Saturday, October 31, David and Theony went to Appellant's house. Theony noticed that the living room carpet was gone and the house had an unusual chemical smell. Theony testified that Appellant and David had had discussions about "taking care of" Summers, but they seemed more serious about it on Halloween. She said they wanted to "get him" for cheating with Payton. Theony had indicated to David that she did not want to participate in anything happening to Summers, but that afternoon David held Theony against the wall in Appellant's kitchen, pressed his gun to her head, and told her to get Summers to a place where David could "get him." David told her that she would do it or else she would end up "with that b**** in the lake."

That afternoon, Theony began sending text messages to Summers. Theony told him that she and David had broken up and that she wanted to hang out with Summers. As their message exchange progressed, Theony promised Summers sexual activity if he would meet up with her that night. He agreed to meet her at 86th and Ash. Around 9:00 that night, Summers arrived at the location, where David was waiting. While Summers was still in his vehicle, David shot him with his 9mm Ruger pistol. At 9:20 p.m., Summers made a 9-1-1 call to report that he had just been shot. Shortly thereafter, David entered Summers' vehicle, pushed Summers into the passenger seat, and drove the vehicle to a field off east 19th Street. David shot Summers again before pouring gasoline onto him and lighting the vehicle on fire. Cell phone records indicated that Appellant picked David up and drove him home.[4] David and Theony quickly left Lubbock, traveling to Oklahoma, then Missouri, then Arizona, where they were arrested. David confessed to murdering

[4] David told investigators that he walked to a hotel after starting the fire, then called Theony to pick him up.

Summers but did not implicate Appellant in the crime. When called as a witness at Appellant's trial, David refused to answer any questions.

On November 1, 2015, a passerby saw a body, wrapped in a comforter, beneath the spillway at Buffalo Springs Lake. Rescue crews recovered the body, which was weighted down with a chain and cinder blocks. It was Payton. She had been shot four times in the head. The comforter matched pillow shams found in Appellant's home. Paint chips on the cinder blocks matched paint chips found in David's vehicle. Payton's blood was found in Appellant's home and on a floor mat from the bed of Appellant's vehicle. Two of Payton's gold rings were found in Appellant's vehicle.

Appellant was indicted on June 15, 2021, by the grand jury of Lubbock County for the offense of capital murder. After a two-week trial, at which more than 30 witnesses testified, the jury found Appellant guilty.

ANALYSIS

Issue 1: Failure to Include Definitions in Jury Charge

In his first issue, Appellant asserts that the trial court's charge was too vague with respect to the meaning of the words and phrases used to elevate the offense of murder to capital murder. We review alleged jury charge error in a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, we determine whether the charge contains error. *Id.* If the charge is erroneous, we then analyze the error for harm. *Id.* If the defendant timely objected to the jury instructions, reversal is required if there was some harm to the defendant. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)). If the

defendant did not timely object to the jury instructions, "reversal is required only if the error was so egregious and created such harm that the defendant did not have a fair and impartial trial." *Id.*

Here, the charge stated that "[a] person commits the offense of capital murder if the person murders more than one person during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct." It further instructed the jury that, if it found beyond a reasonable doubt that Appellant intentionally or knowingly caused the death of Payton and intentionally or knowingly caused the death of Summers, "and both murders were committed pursuant to the same scheme or course of conduct, but during different criminal transactions," then it would find Appellant guilty of the offense of capital murder. At the charge conference, Appellant's trial counsel objected that the phrase "same scheme or course of action" was "too vague." Counsel acknowledged that the language in the charge tracked the statute[5] and that there was no definition for the phrase in the Penal Code. Counsel did not offer a proposed definition. The trial court overruled his objection. On appeal, Appellant contends that, without further definition, jurors had no guidance by which to distinguish "one from more than one criminal transaction."

The trial judge is required to give the jury a written charge setting forth the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14. Statutorily defined terms constitute law applicable to the case and must be included in the court's charge. *Celis v.*

[5] The jury charge, like the indictment, tracks the language of section 19.03(a)(7)(B) of the Texas Penal Code, which elevates the offense of murder to capital murder based on two murders committed "during different criminal transactions but [when] the murders are committed pursuant to the same scheme or course of conduct." TEX. PENAL CODE. ANN. § 19.03(a)(7)(B).

State, 416 S.W.3d 419, 433 (Tex. Crim. App. 2013). However, it is generally impermissible for the trial court to define terms in the jury charge that are not statutorily defined, as such terms are not considered to be the "applicable law" under article 36.14. *Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015). Statutorily undefined terms generally should be "read in context and construed according to the rules of grammar and common usage." TEX. GOV'T CODE ANN. § 311.011(a). Jurors "may 'freely read [undefined] statutory language to have any meaning which is acceptable in common parlance.'" *Kirsch*, 357 S.W.3d at 650 (quoting *Denton v. State*, 911 S.W.2d 388, 390 (Tex. Crim. App. 1995)). But "terms which have a known and established legal meaning, or which have acquired a peculiar and appropriate meaning in the law, as where the words used have a well-known common law meaning," are to be considered as being used in their technical sense. *Id.* (quoting *Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000)).

"Same scheme or course of conduct" is not defined in the Penal Code. Nor is "criminal transaction."[6] Because the terms are not statutorily defined, the trial court was correct to decline to define the terms in the jury charge unless the terms have acquired an established legal or technical meaning that differs from the meanings accepted in common parlance. *See Green*, 476 S.W.3d at 445. Appellant has not cited any authority establishing that "same scheme or course of action" or "criminal transaction" has a technical or legal meaning that differs from common usage, nor has he provided guidance

[6] Appellant also suggests that the trial court should have defined the phrase "criminal transaction." Because Appellant's trial objection did not address the lack of a definition for "criminal transaction," we may not reverse for this alleged jury charge error unless the record shows "egregious harm." *See Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005) (en banc).

on what the proper definition of these terms should be. Instead, he submits that the trial court was obliged to draw from the language of various Texas cases "to clarify, to the extent possible, the meaning of the parts of the charge here at issue."

Because these terms are not statutorily defined and Appellant has directed this Court to no authority establishing that these terms have acquired a special legal or technical meaning, we conclude that the trial court did not err by failing to define either term in the jury charge. The jury was properly allowed to assign the terms any meaning ascribed in common parlance. *See Kirsch*, 357 S.W.3d at 650. Having concluded that the trial court did not err in not defining "same scheme or course of conduct" or "criminal transaction," we need not conduct a harm analysis. *Id.* at 649. We overrule Appellant's first issue.

To the extent that Appellant's first issue is intended to encompass a claim that section 19.03(a)(7)(B) of the Penal Code is unconstitutional as applied to him, such a claim cannot be raised for the first time on appeal. *See, e.g., Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014) ("'As applied' constitutional claims are subject to the preservation requirement and therefore must be objected to at the trial court in order to preserve error."). Although Appellant objected that the phrase "same scheme or course of action" was "too vague," he did not raise an objection on constitutional grounds, as required to preserve an as-applied challenge. *See* TEX. R. APP. P. 33.1(a) (general rule for preservation of error); *Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) ("specific, timely objection" at trial required to preserve as-applied constitutional challenge). Therefore, we reject Appellant's attack on the constitutionality of the statute.

Issue 2: Sufficiency of the Evidence

In his second issue, Appellant challenges the sufficiency of the evidence to establish that the killings were committed pursuant to the same scheme or course of conduct, but during different criminal transactions. Appellant argues that the two murders were part of a single criminal transaction.

When assessing the sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). The sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. *See Hardy v. State*, 281 S.W.3d 414, 421 (Tex. Crim. App. 2009); *Malik v. State*, 953 S.W.2d 234, 239–40 (Tex. Crim. App. 1997).

As discussed above, the legislature did not define either "criminal transaction" or "same scheme or course of conduct" as used in the capital murder statute, and the trial court did not provide a definition in the charge. The Texas Court of Criminal Appeals has explained that the difference between murders that occur "during the same criminal transaction" and murders that occur "pursuant to the same scheme or course of conduct" is "the degree of 'the continuity of the killing.'" *Coble v. State*, 871 S.W.2d 192, 198 (Tex. Crim. App. 1993) (en banc) (quoting *Rios v. State*, 846 S.W.2d 310, 314 (Tex. Crim. App. 1992)). In *Coble*, the court determined that murders occurred "during the same criminal

transaction" when they "occurred in close proximity to each other, on the same road, within a few hours of each other, in a continuous and uninterrupted series of events." *Id.* at 198–99; *see also Vuong v. State*, 830 S.W.2d 929, 941 (Tex. Crim. App. 1992) (en banc) (murders occur during same criminal transaction when evidence shows "a continuous and uninterrupted chain of conduct occurring over a very short period of time . . . in a rapid sequence of unbroken events."). In contrast, murders occur "pursuant to the same scheme or course of conduct" when the evidence shows a break in conduct but an "over-arching objective or motive . . . ." *Feldman v. State*, 71 S.W.3d 738, 754 (Tex. Crim. App. 2002).

The question before us is whether a jury could rationally conclude that Appellant committed the murders during different "criminal transactions," but pursuant to the "same scheme or course of conduct." Viewed in the light most favorable to the jury's verdict, the evidence supports the jury's conclusion that the two murders were so committed. The evidence adduced at trial established a temporal and geographic break between the murder of Payton and the murder of Summers. There was evidence showing that Payton was shot in the head four times on Wednesday, October 28, 2015, at Appellant's home, while Appellant was on his lunch break. Appellant returned to work and worked regular hours for the remainder of the week. Payton's body, wrapped in a comforter and weighted down with chains and cinder blocks, was recovered from the lake on November 1. Summers was killed on Saturday, October 31, in Lubbock. He was shot and driven to a field, where he and his vehicle were doused with gasoline and set on fire. His body, still inside the burning vehicle, was discovered that night. These separate locales, along with the lapse of a few days between the murders, provide a break in the continuity of the

killings. Thus, the jury could rationally conclude that the two murders were not committed as part of a single criminal transaction. *See, e. g., Burkett v. State*, 172 S.W.3d 250, 254 (Tex. App.—Beaumont 2005, pet. ref'd) (where evidence established temporal and geographic discontinuity between murder of woman in her home and murder of her son and his friend hours later in wooded area, evidence was legally sufficient to support conclusion that murders were committed in different criminal transactions).

Further, the evidence supports the jury's conclusion that the murders were committed pursuant to a common scheme or course of conduct. The evidence showed that the over-arching objective for the killings was Appellant's desire to get revenge because Payton had been having an affair with Summers. The same motivating reason was behind both murders. *See id.* (three murders were committed pursuant to same scheme or course of conduct when committed in course of stealing family's vehicles).

We conclude that a rational trier of fact could have found, beyond a reasonable doubt, that the murders were not part of a single criminal transaction but were committed pursuant to the same scheme or course of conduct. We overrule Appellant's second issue.

Issue 3: Accomplice Witness Instruction Regarding David Bethel

In his third issue, Appellant contends that the trial judge undermined the presumption of innocence and improperly commented on the weight of the evidence by including a sentence in the court's charge reading, "David Bethel a/k/a Dave Bethel is an accomplice to the crime of murder, if it was committed, a lesser included offense of the crime charged in the indictment." The following sentence reads, "The defendant, Mark

Bethel, therefore cannot be convicted on the testimony of David Bethel a/k/a Dave Bethel unless the testimony is corroborated."

"One who participates with the defendant before, during, or after the commission of the crime and acts with the required culpable mental state for the crime is an accomplice." *Patterson v. State*, 606 S.W.3d 3, 29 (Tex. App.—Corpus Christi-Edinburg) (citing *Ash v. State*, 533 S.W.3d 878, 884 (Tex. Crim. App. 2017)). An accomplice witness instruction requires a jury to find that the testimony of an accomplice witness was corroborated before it can rely on that testimony for a conviction. TEX. CODE CRIM. PROC. ANN. art. 38.14 (conviction may not be had upon testimony of an accomplice unless that testimony is corroborated by other non-accomplice witness evidence tending to connect defendant to the crime). If a prosecution witness is an accomplice as a matter of law, the trial court is under a duty to instruct the jury accordingly and the failure to do so is error. *Herron v. State*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002) (en banc).

At trial, David was called as a witness, but he refused to answer any questions. The trial court held him in contempt of court. The trial court also stated that David had been granted testimonial immunity and that any testimony he gave in the trial could not be used against him in any later criminal proceeding. After David was excused, the jury viewed a videotaped recording of his interview with investigators, pursuant to an agreement between the State and Appellant's trial counsel.

Appellant argues that there was no basis to include the accomplice witness instruction because David never testified and that, by including the instruction, the trial court effectively instructed the jury that Appellant was a "partner in crime" with David. Appellant did not object to the inclusion of the instruction at trial. Therefore, "reversal is

required only if the error was so egregious and created such harm that the defendant did not have a fair and impartial trial." *Marshall*, 479 S.W.3d at 843.

Assuming without deciding that it was erroneous to include the accomplice witness instruction regarding David in the jury charge, we will proceed to a harm analysis. We review the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information in order to determine whether the error was so egregious that Appellant was denied a fair and impartial trial. *Almanza*, 686 S.W.2d at 171–74.

A trial court improperly comments on the weight of the evidence if it makes a statement that implies approval of the State's argument, indicates disbelief in the defense's position, or diminishes the credibility of the defense's approach to the case. *Clark v. State*, 878 S.W.2d 224, 226 (Tex. App.—Dallas 1994, no pet.). The plain purpose of the accomplice witness instruction is to disallow any conviction based upon uncorroborated testimony of an accomplice. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14. Here, the instruction is qualified and therefore not a comment on the weight of the evidence. *See Easter v. State*, 867 S.W.2d 929, 941 (Tex. App.—Waco 1993, pet. ref'd) (holding that because instruction included phrases "if any were committed" and "if any," it was not a comment on the weight of the evidence). Moreover, the instruction is intended to benefit the accused. *See Hareter v. State*, 435 S.W.3d 356, 360 (Tex. App.—Amarillo 2014, no pet.) ("We hardly see how an instruction benefiting an accused can, at the same time, amount to a comment on the weight of the evidence benefiting the State.").

Even if the instruction was unwarranted, we do not find egregious harm. To the extent that the instruction focused the jury's attention on David, it did so with the purpose of requiring the jury to corroborate David's testimony. *See Druery v. State*, 225 S.W.3d

491, 497–98 (Tex. Crim. App. 2007) (accomplice witness instruction, even if superfluous, "could only benefit" defendant). There is no indication that Appellant was harmed by an instruction requiring additional corroborating evidence. We conclude that Appellant was not denied a fair and impartial trial, and the inclusion of the accomplice witness instruction, if error, was not reversible error in this case. Appellant's third issue is overruled.

Issue 4: Caution Regarding Witness Testimony

In the first part of Appellant's fourth issue, he asserts that the trial court should have included a cautionary warning about witness bias, prejudice, and interest in its charge to the jury. Specifically, Appellant contends that he was harmed by the trial court's failure to sua sponte instruct the jury that Theony's testimony needed corroboration or greater scrutiny and suggests that a direct warning is necessary to alert jurors of the unreliable nature of "corrupt source" testimony.[7]

The court's charge instructed the jury to determine whether Theony was an accomplice as a matter of fact and the need for evidence to corroborate her testimony if it determined that she was. Appellant did not request any further instruction from the trial court. Although Appellant devotes thirty-odd pages of his brief to a discussion of the history of felon-witness testimony in the United States, he cites no authority requiring trial courts to submit the instruction he discusses on appeal. In fact, Appellant acknowledges that "Texas practice does not include such an instruction on witness bias, prejudice, or interest in the outcome of the case."

[7] Appellant describes Theony as a "memory-impaired, state-immunized Backpage prostitute . . . a prosecution-admitted unindicted co-conspirator and long-time Dave Bethel tag-along."

It is axiomatic that a trial judge may not single out certain testimony and comment on it. *Russell v. State*, 749 S.W.2d 77, 78 (Tex. Crim. App. 1988). Likewise, the court's charge may not suggest that certain evidence is true or untrue or instruct the jury on the weight to be given certain testimony. *Id.* ("It has long been held that it is reversible error for the trial court to give instructions that refer to the credibility of the witnesses."). As Appellant acknowledges, Appellant's desired instruction is at odds with article 36.14 of the Texas Code of Criminal Procedure, which provides that the court's charge should not express any opinion as to the weight of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14. Therefore, we conclude that the trial court did not err in failing to direct the jury on how to assess Theony's testimony and we overrule this issue.

Issue 4A: Accomplice Witness Instruction Regarding Theony

In a subpart of Appellant's fourth issue, he claims that the trial court erred by submitting a "maybe" accomplice witness instruction regarding Theony instead of a "for sure" accomplice witness instruction. The charge read, "You must determine whether [Theony] is an accomplice to the crime of capital murder, if it was committed, or a lesser included offense of that crime. If you determine that [Theony] is an accomplice, you must then also determine whether there is evidence corroborating the testimony of [Theony]." Appellant made no objection to the paragraph submitted on the accomplice witness issue. Again, we review alleged jury charge error in a two-step process, first determining whether the charge contains error and then analyzing the error for harm. *Kirsch*, 357 S.W.3d at 649. Because Appellant did not object to the instruction he challenges on appeal, he must show egregious harm to be entitled to reversal. *Lozano v. State*, 636 S.W.3d 25, 29 (Tex. Crim. App. 2021).

A witness can be an accomplice as a matter of law or as a matter of fact. If a testifying witness is an accomplice as a matter of law, the trial court must instruct the jury accordingly, but if the evidence is conflicting, the jury must determine whether the witness is an accomplice as a matter of fact. *Biera v. State*, 280 S.W.3d 388, 394 (Tex. App.—Amarillo 2008, pet. ref'd) (citations omitted). Whether a defendant is entitled to an accomplice witness instruction is a function of the evidence produced at trial. *Ash*, 533 S.W.3d at 884. A witness is an accomplice as a matter of law when (1) the witness has been charged with the same offense as the defendant or a lesser-included offense, (2) the State charges the witness with the same or lesser-included offense as the defendant but dismisses the charges in exchange for the witness's testimony against the defendant, or (3) the evidence is uncontradicted or so one-sided that a reasonable juror could only conclude the witness was an accomplice. *Id.* Where the evidence presented by the parties is conflicting and it remains unclear whether the witness is an accomplice, the trial judge should allow the jury to decide whether the inculpatory witness is an accomplice witness. *Druery*, 225 S.W.3d at 498–99.

Theony was not charged with an offense in this case. While there was evidence showing that she lured Summers to the place where David was lying in wait, there was also evidence indicating that she did so under duress. Theony testified that David put a gun to her head and told her to get Summers to a place where David could "get him," or else she would end up "with that b**** in the lake." Theony initially told law enforcement that she did not expect the confrontation between David and Summers to end in murder, but rather just a fight or intimidation. However, she later testified that because of "the way Dave is," she "could have gathered" that Summers was going to die.

For the evidence to raise a witness's culpability as a party, it must show the witness acted "with intent to promote or assist the commission of the offense" with which the defendant is charged. TEX. PENAL CODE ANN. § 7.02(a)(2). This requires a showing that the witness "harbored the specific intent to promote or assist the commission of the offense . . . ." *Pesina v. State*, 949 S.W.2d 374, 382 (Tex. App.—San Antonio 1997, no pet.). A person acts with intent with respect to the nature of her conduct or to a result of her conduct when it is her conscious objective or desire to engage in the conduct or cause the result. *See* TEX. PENAL CODE ANN. § 6.03(a). Therefore, in order to be an accomplice, Theony had to have had the conscious desire to promote or assist the commission of the offense.

The evidence does not conclusively establish that Theony harbored the necessary *mens rea*. Further, Theony was not indicted for any offense. Thus, she was not an accomplice as a matter of law. The trial court did not err in allowing the jury to determine whether Theony was an accomplice witness as a matter of fact. *Druery*, 225 S.W.3d at 498–99. Because we conclude there was no error, we need not conduct a harm analysis. We overrule issue 4A.

Issue 4B: Error in Statement Regarding Corroboration

In the final subpart of Appellant's fourth issue, he claims that the court's charge misstated the law on accomplice testimony, confusing the jury and resulting in an unreliable verdict. As discussed above, the charge included an unobjected-to accomplice witness instruction directed at the testimony of David, who refused to testify when called to the stand. The jury was instructed that Appellant "cannot be convicted on the testimony of David Bethel a/k/a Dave Bethel unless the testimony is corroborated." Appellant

contends that the instruction in this case likely caused more confusion than clarity, because it "impugned and discredited all of Dave Bethel's out of court statement, even the part that tended to exonerate [Appellant]."

The accomplice witness instruction, derived from article 38.14 of the Texas Code of Criminal Procedure, "does not apply to out-of-court statements but, rather, live testimony of an accomplice at trial." *Tidrow v. State*, No. 07-19-00396-CR, 2020 Tex. App. LEXIS 4666, at *4 (Tex. App.—Amarillo June 23, 2020, no pet.) (mem. op.) (not designated for publication); *see also Bingham v. State*, 913 S.W.2d 208, 210 (Tex. Crim. App. 1995) (op. on reh'g) (en banc). Because David did not provide live testimony at trial, the accomplice witness instruction was unnecessary.[8] Assuming that inclusion of the superfluous instruction was erroneous, because no objection was raised at trial, reversal is required only if the error was so egregious and created such harm that Appellant did not have a fair and impartial trial. *Marshall*, 479 S.W.3d at 843.

Generally, an accomplice witness instruction regarding David's testimony would benefit Appellant by requiring additional corroborating evidence that would not otherwise be required. *Druery*, 225 S.W.3d at 497–98. Here, Appellant suggests that the instruction was harmful because jurors could have understood it to mean that additional corroborating evidence was necessary for all of David's out-of-court statement, including portions that were helpful to Appellant.

[8] David answered only two questions on the witness stand. Both were directed at him by the trial court. The first confirmed his understanding that he could be held in contempt if he refused to answer questions posed by the attorneys, and the second confirmed that it was still his intent to refuse to answer questions.

First, we note that the instruction specifically references David's testimony, not his out-of-court statement. Thus, on its face, the instruction does not indicate that David's out-of-court statement requires corroboration. Appellant has not directed us to any evidence in the record that the jury was confused by the instruction, and we presume the jury followed the trial court's instructions. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005).

Second, the language of the instruction concerns only the use of David's testimony to convict Appellant. It directs the jury that it "cannot convict [Appellant] on the testimony of David Bethel a/k/a Dave Bethel" unless there is evidence corroborating David's testimony. The instruction does not bear upon the use of David's testimony to acquit Appellant. *See, e.g.*, *McAfee v. State*, 204 S.W.3d 868, 879–80 (Tex. App.—Corpus Christi 2006, pet. ref'd) (Yanez, J., dissenting) (en banc) ("Courts have acknowledged that the purpose of the corroboration requirement in article 38.14 is to ensure that a conviction rests upon more than just the testimony of an accomplice . . . ."); *see also Ramirez v. State*, No. 01-08-00535-CR, 2010 Tex. App. LEXIS 4365, at *24 (Tex. App.—Houston [1st Dist.] June 10, 2010, pet. ref'd) (mem. op., not designated for publication) ("[T]he accomplice-witness rule protects the interests of the defendant by requiring the State to bring additional evidence connecting the defendant with the offense committed.").

The instruction, even if erroneous, did not usurp the jury's role "to judge for itself the credibility of the evidence and the soundness of the arguments presented." *Jester v. State*, 62 S.W.3d 851, 855–56 (Tex. App.—Texarkana 2001, pet. ref'd). Appellant has not shown, and we cannot conclude, that he suffered egregious harm.

Finally, to the extent that Appellant's issue 4B also encompasses the argument that the trial court should have provided a cautionary warning about witness bias, prejudice, and interest with regards to "corrupt source" David's testimony, we reject Appellant's argument. As set forth in our analysis of issue 4, such an instruction is incompatible with article 36.14's mandate that the court's charge should not express any opinion as to the weight of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14; *see also Russell*, 749 S.W.2d at 78 (it is reversible error for trial court to give instructions that refer to credibility of witnesses). We overrule Appellant's fourth issue in its entirety.

CONCLUSION

For the reasons stated, we affirm the judgment of the trial court.

Judy C. Parker
Justice

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State ProsecutingAttorney		information@spa.texas.gov	7/17/2023 6:57:18 AM	SENT